

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

EMC CORPORATION AND EMC ISRAEL)	
DEVELOPMENT CENTER, LTD.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. _____
)	
ZERTO, INC.,)	DEMAND FOR JURY TRIAL
)	
Defendant.)	

COMPLAINT

Plaintiffs EMC Corporation (“EMC”) and EMC Israel Development Center, Ltd. (“EIDC”), by and through their undersigned counsel, for their Complaint against defendant Zerto, Inc. (“Zerto”), hereby demand a jury trial and allege as follows:

NATURE OF THE ACTION

1. Founded in 1979, EMC is the global leader in data storage and management, servicing a broad range of customers around the world, in every major industry, in the public and private sectors, and of sizes ranging from the Fortune Global 500 to small- and medium-sized businesses. EMC products and services provide the foundation for organizations to store, manage, protect, analyze and secure their vast and increasing quantities of information, improve business agility, lower cost of ownership and enhance their competitive advantage.

2. Among its many product and service offerings, EMC provides customers with data protection and replication solutions. EMC’s data protection and replication solutions allow customers to replicate their data in a manner that allows efficient and precise recovery of data in the event of problems such as server failures, data corruption, and catastrophic events.

One of EMC's replication products is the RecoverPoint™ family of data protection and replication solutions.

3. In 2001, Ziv Kedem founded Kashya Inc. ("Kashya"), and his brother Oded Kedem was one of the company's first employees. Kashya was a software company that developed data protection and replication software, including continuous data protection (CDP) technology.

4. In 2006, EMC acquired Kashya, and Ziv Kedem and Oded Kedem became EMC employees. In particular, Ziv Kedem was EMC's Vice President and Chief Technology Officer for RecoverPoint™, and Oded Kedem was Director of Engineering and managed the RecoverPoint™ research and development organizations. In such roles, Ziv Kedem and Oded Kedem worked on incorporating Kashya's data protection and replication software, including continuous data protection technology, into EMC's RecoverPoint™ product and developing next-generation versions of RecoverPoint™. Accordingly, Ziv Kedem and Oded Kedem had intimate knowledge of EMC's RecoverPoint™ family of data protection technology, and contributed to that technology as evidenced by being named as inventors on EIDC patents related to RecoverPoint™. After the acquisition by EMC, Kashya's Israel-based research and development operations became EIDC.

5. After terminating their employment with EMC in 2007 and 2009, Ziv Kedem and Oded Kedem co-founded Zerto in 2009, and serve as its Chief Executive Officer and Chief Technology Officer, respectively.

6. Zerto now offers data protection and replication products that incorporate RecoverPoint™ technology and, more specifically, technology that is covered by EIDC patents

for which EMC has an exclusive license. Ziv Kedem and Oded Kedem are inventors on some of those EIDC patents. Accordingly, EMC and EIDC bring this patent infringement litigation.

THE PARTIES

7. EMC is a Massachusetts corporation with a place of business at 176 South Street, Hopkinton, Massachusetts 01748.

8. EIDC is an Israeli corporation with a place of business at 7 Hamada Street, Herzliya, Israel.

9. EIDC is substantially a wholly-owned subsidiary of EMC.

10. Upon information and belief, Zerto is a Delaware corporation with a place of business at 27-43 Wormwood Street, Suite 530, Boston, MA 02210.

JURISDICTION, VENUE AND NATURE OF ACTION

11. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 100 *et seq.*

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

13. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400(b).

14. Zerto is subject to this Court's personal jurisdiction because Zerto is a Delaware corporation and has purposely availed itself of the rights and benefits of the laws of Delaware.

BACKGROUND

I. EMC Acquires Kashya

15. Ziv Kedem and Oded Kedem are brothers.

16. Ziv Kedem was among the founders of Kashya in 2001 and was Kashya's Chief Technology Officer.

17. Oded Kedem was among Kashya's earliest employees and led its Storage Group.

18. Kashya developed enterprise-class data protection and replication software, including market-leading continuous data protection technology.

19. Kashya's technology allows for the continuous replication of an organization's data. Rather than replicating an organization's data at specific intervals (e.g., every 24 hours), an organization's data is automatically replicated every time a change is made to the data.

20. The Kashya technology is agnostic to the underlying storage platform which means it allows for remote replication across heterogeneous environments, e.g., allows data stored on one type of storage system to be replicated onto a different type of storage system.

21. Both Ziv Kedem and Oded Kedem worked on developing Kashya's data protection and replication software, including its continuous data protection technology.

22. On May 9, 2006, EMC acquired Kashya in a cash transaction valued at approximately \$153 million.

23. In its press release announcing the acquisition, EMC stated: "Kashya also brings its market-leading continuous data protection (CDP) technology to EMC to be used as the engine in future releases of EMC RecoverPoint™ software."

24. After the acquisition, Kashya employees, including Ziv Kedem, Oded Kedem and others, became employed by EMC's Software Group at EIDC.

25. Ziv Kedem joined EMC as a Vice President.

26. Oded Kedem joined EMC as a Senior Manager of Software Development. Oded Kedem was later promoted to Senior Manager of Software Engineering and eventually to Director of Engineering.

27. As employees of EMC, Ziv Kedem and Oded Kedem held leadership positions in the development of future releases of EMC's RecoverPoint™ software that incorporated and built on Kashya's data protection and replication technology, including its technology for allowing continuous data protection in a heterogeneous environment.

28. The RecoverPoint™ products released after EMC's acquisition of Kashya store overwritten data in a journal which can be used to provide rapid point-in-time recovery to any of multiple points in time, and employ tagging for consistent data recovery.

29. The United States Patent and Trademark Office has awarded EIDC numerous patents on innovative data protection and replication technology that resulted from these development efforts, including U.S. Patent Nos. 7,849,361 ("the '361 patent"), 7,516,287 ("the '287 patent"), and 7,577,867 ("the '867 patent").

30. The '361 patent, entitled "Methods and Apparatus for Multiple Point in Time Data Access," was filed on December 12, 2006 and issued on December 7, 2010.

31. The '287 patent, entitled "Methods and Apparatus for Optimal Journaling For Continuous Data Replication," was filed on September 28, 2006 and issued on April 7, 2009.

32. The '867 patent, entitled "Cross Tagging to Data for Consistent Recovery," was filed on February 17, 2006 and issued on August 18, 2009.

33. Oded Kedem is a named inventor on the '361 patent.

34. Oded Kedem assigned his rights to the '361 patent to EIDC.

35. In filing the application that issued as the '361 patent, Oded Kedem declared under oath: "I believe I am an original, first and joint inventor of the subject matter" claimed in the application.

36. Oded Kedem is a named inventor on the '287 patent.

37. Oded Kedem assigned his rights to the '287 patent to EIDC.

38. In filing the application that issued as the '287 patent, Oded Kedem declared under oath: "I believe I am an original, first and joint inventor of the subject matter" claimed in the application.

39. Ziv Kedem is a named inventor on the '867 patent.

40. Ziv Kedem assigned his rights to the '867 patent to EIDC.

41. In filing the application that issued as the '867 patent, Ziv Kedem declared under oath: "I believe the inventor(s) named below to be the original and first inventor(s) of the subject matter which is claimed" in the application. The declaration identifies Ziv Kedem as one of the "inventor(s) named below."

42. EIDC owns the '361 patent.

43. EIDC owns the '287 patent.

44. EIDC owns the '867 patent.

45. EMC is the exclusive licensee of the '361, '287, and '867 patents.

II. Ziv Kedem and Oded Kedem Left EMC and Founded Zerto to Compete Against EMC.

46. On January 4, 2007, Ziv Kedem terminated his employment with EMC.

47. Ziv Kedem left EMC after working on and developing intimate knowledge of EMC's data protection and replication technology, including new versions of RecoverPoint™.

48. On October 8, 2009, Oded Kedem terminated his employment with EMC.

49. Oded Kedem left EMC after working on and developing intimate knowledge of EMC's data protection and replication technology, including new versions of RecoverPoint™.

50. Upon information and belief, at least as early as October 2009, the same month Oded Kedem left EMC, Ziv and Oded Kedem founded Zerto.

51. Zerto provides data replication software for the enterprise market.

52. Zerto's software product, Virtual Replication, became commercially available on August 15, 2011.

53. Zerto competes with EMC.

54. Zerto incorporated EMC's fundamental and patent-protected technologies into its Virtual Replication software.

55. For example, Zerto's Virtual Replication software is agnostic to the underlying storage platform, provides journal-based continuous data protection and instant point-in-time recovery to any one of multiple recovery points, and enables remote replication across heterogeneous storage systems.

56. Zerto has not obtained permission from EMC or EIDC to use RecoverPoint™ technology.

57. Zerto does not have a license to the '361, '287, or '867 patents.

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 7,849,361

58. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

59. EIDC is the owner by assignment of the '361 patent. A copy of the '361 patent is attached to this Complaint as Exhibit A.

60. EMC is the exclusive licensee of the '361 patent.

61. On information and belief, Zerto has infringed, and continues to infringe, literally or under the doctrine of equivalents, the '361 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including, but not limited to Zerto's Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the '361 patent and contributing to the infringement of the '361 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for Zerto's software and/or components, including its Virtual Replication software offerings.

62. On information and belief, Zerto has been aware of the '361 patent because Oded Kedem, one of Zerto's founders, is a named inventor of the patent.

63. On information and belief, at all relevant times, Zerto had actual notice and knowledge that its conduct infringed the claims of the '361 patent, but Zerto nevertheless continued its willful infringing conduct.

64. On information and belief, at all relevant times, Zerto had actual notice and knowledge that the conduct of others, including but not limited to Zerto's customers, directly infringed the claims of the '361 patent.

65. Zerto's infringement of the '361 patent has caused and continues to cause EMC and EIDC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto from continuing its infringing activities.

66. Upon information and belief, Zerto's infringement of the '361 patent was and remains willful and deliberate.

COUNT II

INFRINGEMENT OF U.S. PATENT NO. 7,516,287

67. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

68. EIDC is the owner by assignment the '287 patent. A copy of the '287 patent is attached to this Complaint as Exhibit B.

69. EMC is the exclusive licensee of the '287 patent.

70. On information and belief, Zerto has infringed, and continues to infringe, literally or under the doctrine of equivalents, the '287 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including, but not limited to Zerto's Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the '287 patent and contributing to the infringement of the '287 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for Zerto's software and/or components, including its Virtual Replication software offerings.

71. On information and belief, Zerto has been aware of the '287 patent because Oded Kedem, one of its founders, is a named inventor of the patent.

72. On information and belief, at all relevant times, Zerto had actual notice and knowledge that its conduct infringed the claims of the '287 patent, but Zerto nevertheless continued its willful infringing conduct.

73. On information and belief, at all relevant times, Zerto had actual notice and knowledge that the conduct of others, including but not limited to Zerto's customers, directly infringed the claims of the '287 patent.

74. Zerto's infringement of the '287 patent has caused and continues to cause EMC and EIDC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto from continuing its infringing activities.

75. Upon information and belief, Zerto's infringement of the '287 patent was and remains willful and deliberate.

COUNT III

INFRINGEMENT OF U.S. PATENT NO. 7,577,867

76. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

77. EIDC is the owner by assignment of the '867 patent. A copy of the '867 patent is attached to this Complaint as Exhibit C.

78. EMC is the exclusive licensee of the '867 patent.

79. On information and belief, Zerto has infringed, and continues to infringe, literally or under the doctrine of equivalents, the '867 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to Zerto's Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the '867 patent and contributing to the infringement of the '867 patent by supplying said software and/or components to others, including but not limited to customers.

There are no substantial non-infringing uses for Zerto's software and/or components, including its Virtual Replication software offerings.

80. On information and belief, Zerto has been aware of the '867 patent because Ziv Kedem, one of its founders, is a named inventor of the patent.

81. On information and belief, at all relevant times, Zerto had actual or constructive notice and knowledge that its conduct infringed the claims of the '867 patent, but Zerto nevertheless continued its willful infringing conduct.

82. On information and belief, at all relevant times, Zerto had actual notice and knowledge that the conduct of others, including but not limited to Zerto's customers, directly infringed the claims of the '867 patent.

83. Zerto's infringement of the '867 patent has caused and continues to cause EMC and EIDC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto from continuing its infringing activities.

84. Upon information and belief, Zerto's infringement of the '867 patent was and remains willful and deliberate.

RELIEF REQUESTED

WHEREFORE, plaintiffs EMC and EIDC pray that this Court:

a) Enter judgment that Zerto has directly and indirectly infringed the '361, '287, and '867 patents;

b) Preliminarily and permanently enjoin Zerto, and its officers, agents, servants, employees, representatives, and all persons acting in concert or participation with any of them, from committing further direct infringement of the '361, '287, and '867 patents, or contributing to or inducing the infringement of the '361, '287, and '867 patents by others;

c) Award EMC and EIDC damages in accordance with 35 U.S.C. § 284, including all damages adequate to compensate them for Zerto's infringement, in no event less than a reasonable royalty, such damages to be determined by a jury, and if necessary to adequately compensate EMC and EIDC, an accounting, and that such damages be awarded EMC and EIDC, together with interest, including prejudgment and post-judgment interest, and costs;

d) Determine that Zerto has willfully and deliberately committed acts of patent infringement, and award EMC and EIDC treble damages in light of Zerto's willful infringement, pursuant to 35 U.S.C. § 284;

e) Determine that this is an "exceptional case" pursuant to 35 U.S.C. § 285 and award EMC and EIDC their reasonable legal fees, costs, and expenses that they incur in prosecuting this action;

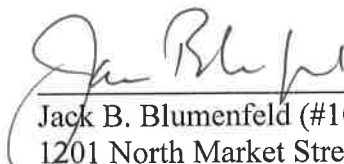
f) Award EMC and EIDC their costs, pre-judgment interest and post-judgment interest;

g) Award such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

EMC and EIDC request a trial by jury on all issues so triable.

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